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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-790

COMMITTEE FOR AUTO RESPONSIBILITY, *et al.*,

Petitioners,

v.

R. G. FREEMAN, III, Administrator,
General Services Administration, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the Committee for Auto Responsibility, the Metropolitan Washington Coalition for Clean Air, Inc. and three individuals respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 24, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 603 F.2d 992 and is reproduced as Appendix A. The order of the Court of Appeals denying petitioners' suggestion of a rehearing *en banc* on August 22, 1979 is reproduced as Appendix B. The order of the United States District Court for the District of Columbia has not been reported and is reproduced as Appendix C.

JURISDICTION

The suggestion for a rehearing *en banc* was denied on August 22, 1979, and this petition for a writ of certiorari was filed within 90 days of the denial of a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Where there is a proposal for a major federal action significantly affecting the environment of either local or national scope is there a requirement under the National Environment Policy Act than an environmental impact statement be prepared?

2. Is there a requirement under the National Environmental Policy Act that prior to preparing an environmental impact statement responsible officials shall consult with and obtain the comments of any federal agency which has jurisdiction or special expertise with respect to any environmental impact involved?

3. What is the proper standard for judicial review of an agency's threshold decision *not to file* an environmental impact statement under the National Environmental Policy Act of 1969?

4. How does the National Environmental Policy Act apply to projects that were ongoing or continuing when the Act was passed?

STATUTORY PROVISIONS INVOLVED

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969*

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and en-

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*42 U.S.C. §4321 *et seq.*, 83 Stat. 852, Pub. L. 91-190. The United States Code sections correspond to the section numbers of the Public Law in the following manner:

Section 2 is 42 U.S.C. §4321
Section 101 is 42 U.S.C. §4331
Section 102 is 42 U.S.C. §4332
Section 103 is 42 U.S.C. §4333
Section 104 is 42 U.S.C. §4334
Section 105 is 42 U.S.C. §4335
Section 201 is 42 U.S.C. §4341
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Section 207 is 42 U.S.C. §4347

Alphabetical and numerical subsections are the same in the Public Law and the United States Code. Only Public Law citations are given in the text.

joyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

Declaration of National Envrionmental Policy

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

(1) Fulfill the responsibilities of each generation trustee of the environment for succeeding generations;

(2) Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall –

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in

planning and in decisionmaking which may have an impact on man's environment;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, *a detailed statement by the responsible official on* –

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State,

and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) Assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971,

such measures as may be necessary to bring their authority and policies into conformity with the intent, purpose, and procedures set forth in this Act.

Sec. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

STATEMENT OF THE CASE

Petitioners filed suit in the United States District Court for the District of Columbia against the Administrator of the General Services Administration and others to require the Federal Government to prepare an environmental impact statement on its nationwide program for subsidized parking for federal employees (including more than 40,000 spaces in the metropolitan Washington, D.C. area) and to prepare an environmental impact statement on a parking-facility-by-parking-facility basis. Concerning the latter, petitioners' suit focused on the largest single parking facility in the District of Columbia, the 1800-car Great Plaza parking lot.

The General Services Administration has not prepared an environmental impact statement on its nationwide parking program and has failed to prepare impact statements concerning individual parking facilities. The GSA prepared an Environmental Analysis of the Outlease of

the Great Plaza Parking Lot but determined that it would not prepare an environmental impact statement. GSA made this decision despite its finding that

> (t)here will be a continuation of the temporary adverse impacts relative to the operation of the Parking lot. These impacts will last as long as the site is used as a parking lot; and are primarily a continuation of pollutants contributed to air quality by the vehicles using the parking lot and a continuation of the congestion on surrounding streets contributed to the vehicles using the parking lot.

Page 5, Environmental Analysis.

Petitioners invoked the jurisdiction of the District Court under 28 U.S.C. Section 1331 (federal question) and 28 U.S.C. Section 1361 (action to compel officer of the United States to perform his duty). The District Court dismissed the complaint by a one-page order. App. C. The Court of Appeals affirmed, holding that GSA was not required to prepare an environmental impact statement where the status quo was not changed. App. 18a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals significantly undermines the purpose of the National Environmental Policy Act (NEPA), which is:

> To declare our national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will *prevent or eliminate damage to the environment* . . .
>
> 42 U.S.C. Section 4321.
> (emphasis added).

The prevention of damage to the environment clearly applies to future programs, or prospectively. The elimination of damage to the environment unambiguously refers

to current damage being done to the environment. NEPA does not ignor the continuation of existing forms of environmental harm; actions which preserve the status quo of environmental degradation should not be allowed to escape the procedural safeguards of NEPA.

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *KLEPPE v. SIERRA CLUB*, 427 U.S. 390 (1976).

A. Where There is a Proposal for a Major Federal Action Significantly Affecting the Environment of Either Local or National Scope an Environmental Impact Statement Must Be Prepared.

In *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), this Court stated that respondents could prevail only if there has been a report or recommendation on a proposal for a major federal action with respect to the Northern Great Plains region. "Our statement of the relevant facts shows that there has been none; instead, all proposals are for actions of either local or national scope." 427 U.S. at 399. The agency involved did in fact file both local and national environmental impact statements. Although the Court did not rule on the requirement to file such statements the Court held that such impact statements were sufficient for compliance with NEPA.

GSA has never prepared an environmental impact statement on its nationwide parking program. GSA has never prepared an environmental impact statement concerning the Great Plaza Parking lot, one of the largest government parking facilities in the nation. Petitioners contend that the respondents are required by the Nat-

tional Environmental Policy Act to prepare an impact statement, either on a facility-by-facility basis or on its national program, or both. The failure to prepare either is contrary to the intent of NEPA and is contrary to *Kleppe v. Sierra Club, supra.*

B. Prior to Preparing an Environmental Impact Statement Responsible Officials Shall Consult With and Obtain the Comments of Any Federal Agency Which Has Jurisdiction or Special Expertise With Respect to Any Environmental Impact Involved.

The Supreme Court recognized that federal agencies have duties under NEPA that arise even before an impact statement is required:

> This is not to say that Section 102(2)(C) imposes no duties upon an agency prior to making a report or recommendation on a proposal for action. The section states that prior to preparing the impact statement the responsible official "shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." Thus, the section contemplates a consideration of environmental factors by the agencies during the evolution of a report or recommendation on a proposal.
>
> *Kleppe v. Sierra Club*, 427 U.S. at 406, n. 15.

Both the Environmental Protection Agency and the Department of Transportation have special expertise regarding the environmental impact of parking facilities. App. D, E. Further, EPA has jurisdicion over automobile parking to the extent that it has an impact on air pollution. See *Arlington County Board v. Richards*, 434 U.S. 7, n. 3 (1977).

Neither the Department of Transportation nor the Environmental Protection Agency were consulted concerning GSA's parking program. Neither agency had the opportunity to comment on GSA's actions. GSA's so-called "Environmental Analysis" is woefully inadequate, in part because of this failure to consult and receive comments from DOT and EPA. This failure to consult agencies with unquestioned expertise violates the procedural safeguards of the National Environmental Policy Act and conflicts with this court's opinion in *Kleppe v. Sierra Club, supra.*

II.

THERE IS A DIVISION AMONG THE CIRCUITS CONCERNING THE STANDARD FOR REVIEW OF AN AGENCY DECISION NOT TO ISSUE AN ENVIRONMENTAL IMPACT STATEMENT.

The United States Court of Appeals for the District of Columbia stated that its standard for review in the case at bar is whether the agency acted arbitrarily or abused its discretion. *Committee for Auto Responsibility v. Solomon,* 603 F.2d 992 at 1002. App. 15a, 16a. At least two other circuits disagree, and have held that courts of appeals:

> are to determine whether the responsible agency has "reasonably concluded" that the project will have *no* significant adverse environmental consequences.
>
> *City of Davis v. Coleman*, 521 F.2d 661 at 673 (9th Cir. 1975) quoting *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973).
> (emphasis added).

In *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Cir. 1973) the Court held that the proper standard for review of an agency's threshold determination not to file an environmental impact statement (EIS) under NEPA is

a standard of *reasonableness* rather than a standard of arbitrariness or capriciousness, as the Court of Appeals below has held. This presents a clear division among the circuits which needs to be resolved.

GSA found that operation of a parking lot has unavoidable adverse environmental impact.[1] GSA could not have met the 5th and 9th circuit standard that its project "will have *no* significant adverse environmental impact," since GSA found to the contrary. This presents a conflict among the circuits which should be resolved.

III.

THERE IS A DIVISION AMONG THE CIRCUITS CONCERNING THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO PROJECTS WHICH WERE ONGOING OR CONTINUING WHEN THE ACT WAS PASSED.

The Court of Appeals below held:

> GSA has clearly shown in the information provided in its environmental analysis that current leasing of the Great Plaza area to a parking management firm does not alter the status quo ante. Without a change in parking policy concerning the Great Plaza area there is no proposal for major federal action significantly affecting the environment.
>
> 603 F.2d at 1003, App. 17a, 18a.
> (footnotes deleted).

The circuit courts have split concerning the applicability of NEPA to ongoing or continuing projects. In *Environmental Defense Fund v. Tennessee Valley Authority* 468 F.2d 1164 (6th Cir. 1972), the Court clearly stated:

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[1] GSA's finding is quoted under Statement of the case at p. 9.

> Congress' intent concerning the applicability of the NEPA to ongoing federal projects is most clearly stated in section 101(b), by the terms of which it is apparent that the Congress envisaged ongoing agency attempts to minimize environmental harm caused by the implementation of agency programs. This would encompass not only constant reevaluations of projects already begun to determine whether alterations can be made in existing features or whether there are alternatives to proceeding with the projects as initially planned, but also the consideration of the environmental impact of all *proposed* agency action.

The Sixth Circuit held in *EDF v. TVA* that NEPA applies to future projects, current projects and ongoing projects started before NEPA was enacted. This decision is squarely in conflict with the decision of the Court below.[2]

The First Circuit, in *Jones v. Lynn*, 477 F.2d 885 (1973), agrees with the Sixth Circuit's position:

> the question must be what agency decisions are yet to be made, and *what decisions, although already made, remain open to revision.*
>
> 477 F.2d at 890.
> (emphasis added).

GSA's decision to subsidize employee parking certainly remains open to revision. Similarly, GSA could reevaluate its decisions to maintain parking facilities, to lease such facilities and to pay for these facilities.

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[2]See also *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972).

A clear conflict among the circuits exists concerning the applicability of NEPA to projects which were commenced before NEPA was enacted. The petition for a writ of certiorari should be granted to clarify the applicability of NEPA to these important federal projects. The purpose of NEPA to "eliminate damage to the environment" compels the Court to review the decision below.

IV.

THE CASE AT BAR PRESENTS IMPORTANT FEDERAL QUESTIONS THAT SHOULD BE REVIEWED BY THE SUPREME COURT.

The federal questions presented are important because the applicability of NEPA to major federal actions which have been ongoing or continuing would have far-ranging impact on the Federal Government and on the environment. This court should clarify the scope of impact statements, when national statements are required and when they are not. Since NEPA provides procedural safeguards the procedures should be beyond dispute. Similarly, the standard for review of agency decisions that NEPA does not require an EIS should be uniform nationwide.

CONCLUSION

For all of these reasons, petitioners request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT,

[No. 77-1160]

COMMITTEE FOR AUTO RESPONSIBILITY
(C.A.R.), *et al.*,
Appellants,

v.

JAY SOLOMON, *et al.*,
Appellees.

[Argued June 6, 1978]
[Decided July 24, 1979]
[Rehearing Denied Aug. 22, 1979]

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(D.C. Civil Action No. 76-2084)

Joel D. Joseph, Washington, D.C., with whom Paul D. Kamenar, Washington, D.C., was on brief, for appellants.

Kenneth M. Raisler, Asst. U.S. Atty., Washington, D.C., with whom Earl J. Silbert, U.S. Atty., and John A. Terry, Asst. U.S. Atty., Washington, D.C., were on the brief, for appellees. Steven D. Gordon, Asst. U.S. Atty., and Sarah W. Wilcox, Atty., Dept. of Justice, Washington, D.C., also entered appearances for appellees.

Before ROBINSON and WILKEY, Circuit Judges, and flannery,* United States District Judge for the United States District Court for the District of Columbia.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

This litigation embodies a challenge to the leasing by the General Services Administration (GSA) of the Great Plaza area of the Federal Trianble in Washington, D.C., for use as a parking facility for employees of federal agencies.[1] Two grounds of attack are advanced. One is that the National Environmental Policy Act of 1969 (NEPA)[2] requires an environmental impact statement

*Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] Appellants state in very general terms that their suit is directed at the "operation" of the Great Plaza parking facility. Brief for Appellants at 3. In order to allege a violation of NEPA, however, appellants must challenge major federal action significantly affecting the quality of the human environment. See notes 33-49 *infra* and accompanying text. In the instant case, the only event that even arguably can be considered a major federal action is GSA's decision to lease the Great Plaza area for vehicular parking. We thus assume that it is this decision that is being attacked by appellants.

The District Court did not focus on GSA's lease, but instead centered its analysis on a reassignment by GSA of parking spaces among government employees, which occurred three days before appellants filed suit on November 7, 1976. The District Court found that the reassignment was not a major federal action requiring an EIS. See note 30 *infra*. While agreeing with this conclusion, we think it more fruitful to focus on the lease itself, to which assignments and reassignments of parking spaces are incidental.

[2] Pub.L. No. 91-190, 83 Stat. 852 (1970), 42 U.S.C. §§ 4321-4361 (1976), as amended by Pub.L. No. 94-52, 89 Stat. 258 (1975); Pub.L. No. 94-83, 89 Stat. 424 (1975); Pub.L. No.

[footnote continued]

(EIS) prior to leasing. The other is that GSA is violating the Public Buildings Amendments of 1972[3] by charging

94-475, 90 Stat. 2071 (1976) [hereinafter cited as codified]. The purposes of NEPA are

> [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (1976). NEPA ordains that all agencies of the Federal Government shall

> . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (1976).

[3] Section 4 of the Public Buildings Amendments of 1972, Pub.L. No. 92-313, 86 Stat. 219 (1976), 40 U.S.C. §§ 490(j), (k) (1976) [hereinafter cited as codified], amended § 210 of the Federal Property and Administrative Services Act of 1949, Pub.L. No. 81-152, 63 Stat. 378 (1949), current version at 40 U.S.C. §§ 471 *et seq.* (1976). The Federal Property and Administrative Services Act of 1949 states that:

> It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of perssonal property and nonpersonal services . . .; (b) the utilization

[footnote continued]

the employee only a portion of the commercial parking rate and assessing the difference to the employee's agency.

Appellants are the Committee for Auto Responsibility and the Metropolitan Washington Coalition for Clean Air,[4] two organizations whose purposes include improvement of the quality of the environment, together with three individuals who live and attend school in the District of Columbia. The Great Plaza area is owned by the Federal Government, and since the 1930's has been leased to parking management firms for periods of approximately four years.[5] It is now leased to Parking

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of available property; (c) the disposal of surplus property; and (d) records management.
40 U.S.C. § 471 (1976).

Section 4 of the Public Buildings Amendments of 1972, 40 U.S.C. § 490(j), (k) (1976), added two new subsections to the 1949 Act. Only subsection (j) bears on the instant litigation, and it states:

> The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services.

40 U.S.C. § 490(j) (1976).

[4]Committee for Auto Responsibility is an unincorporated association whose primary purpose is to improve the quality of the human environment by promoting responsible use of automobiles and public land in ways that minimize adverse environmental effects and conserve finite resources. The Metropolitan Washington Coalition for Clean Air is a nonprofit corporation devoted to the preservation and enhancement of environmental values in the District of Columbia metropolitan area. Its membership consists of approximately 900 citizens in the area. Brief for Appellants at 5-6.

[5]Appendix to Appellant's Brief (app.) 20.

Management, Inc., a private corporation, for a four-year term that began on May 15, 1976.[6] Under the current lease, nearly three-fourths of the parking spaces are reserved during business hours for the use of permit-holding federal employees. Since 1972, permits have been assigned only to employees who carpool.[7]

The District Court denied appellants' request for declaratory and injunctive relief and dismissed their action.[8] They now assert that procedural and substantive errors infected the proceedings before that court. GSA opposes their arguments and insists further that appellants lack standing. Perceiving no reversible error, we affirm.

I.

STANDING

To possess standing to attack GSA's failure to prepare an EIS, appellants must show that they have been "adversely affected" or "aggrieved" within the meaning of Section 10 of the Administrative Procedure Act (APA).[9] That section confers standing only upon those to whom the challenged agency conduct has caused actual injury to an interest within the zone of interests

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[6]Brief for Appellees at 3.

[7]Brief for Appellees at 4.

[8]*Committee for Auto Responsibility v. Eckerd*, Civ. No. 76-2084 (D.D.C. Dec. 6, 1976) (order denying injunctive relief and dismissing complaint), App. 16.

[9]Section 10 of the Administrative Procedure Act, Pub.L. No. 89-554, 80 Stat. 392 (1966), 5 U.S.C. § 702 (1976), provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

protected by the statute allegedly violated.[10] Section 10 calls additionally upon a party to allege an "injury that fairly can be traced to the challenged action of the defendant, and not injury that results from an independent action of some third party not before the court."[11]

We think appellants have satisfied standing requirements to charge violations of NEPA but not of the Public Buildings Amendments of 1972.[12] Appellants

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[10] *United States v. SCRAP*, 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254, 269 (1973); *Sierra Club v. Morton (Mineral King)*, 405 U.S. 727, 733, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636, 642 (1972); *Data Processing Serv. v. Camp*, 397 U.S. 150, 152-153, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184, 188 (1970); *Barlow v. Collins*, 397 U.S. 159, 164, 90 S.Ct. 832, 836, 25 L.Ed.2d 192, 198 (1970); *Coalition for Environment v. Volpe*, 504 F.2d 156, 165 (8th Cir. 1974).

[11] *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450, 462 (1976). In *Simon*, the plaintiffs alleged that a particular revenue ruling adopted by the Internal Revenue Service and the Treasury Department encouraged hospitals to deny medical services to indigents. The Court held that while the plaintiffs may have alleged injury in fact—the denial of medical services—they had failed to show that this injury was traceable to the actions of the defendants, officials of IRS and the Department. *Id.* at 41-43, 96 S.Ct. at 1925-1926, 48 L.Ed.2d at 462-463. See also *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74-78, 98 S.Ct. 2620, 2631-2633, 57 L.Ed.2d 595, 612-614 (1978); *Warth v. Seldin*, 422 U.S. 490, 506-507, 95 S.Ct. 2197, 2209, 45 L.Ed.2d 343, 359 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536, 541 (1973); *Southern Mut. Help Ass'n v. Califano*, 187 U.S.App.D.C. 307, 312-313, 574 F.2d 518, 523-524 (1977); *Animal Welfare Inst. v. Kreps*, 183 U.S.App.D.C. 109, 116-117, 561 F.2d 1002, 1009-1010, *cert. denied*, 434 U.S. 1013, 98 S.Ct. 726, 54 L.Ed.2d 756 (1977).

[12] In the District Court, GSA did not challenge appellants' standing. On the initiative of this court, the standing question was argued on appeal.

claim that they or their membeers[13] live in or near the District of Columbia and regularly travel to educational, cultural and recreational facilities within the immediate vicinity of the Great Plaza. They assertedly are affected by noise, air pollution and congestion from vehicles utilizing the Great Plaza parking lot.[14] Harm to health and conservational interests of parties seeking judicial review is enough to meet the injury-in-fact test for standing,[15] and interests of those sorts are clearly within

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[13] An association has standing to bring suit on behalf of its members when the members would otherwise have standing to sue in their own right, the interests the organization seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the individual participation of the members in the lawsuit. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343-344, 97 S.Ct. 2434, 2441-2442, 53 L.Ed.2d 383, 394 (1977); *Simon v. Eastern Ky. Welfare Rights Organization*, *supra* note 11, 426 U.S. at 39-40, 96 S.Ct. at 1924-1925, 48 L.Ed.2d at 461-462; *Warth v. Seldin*, *supra* note 11, 422 U.S. at 511, 95 S.Ct. at 2211-2212, 45 L.Ed.2d at 362; *NAACP v. Alabama*, 357 U.S. 449, 458-460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, 1497-1498 (1958).

The prerequisites to associational standing are clearly met in this litigation. Committee for Auto Responsibility and Metropolitan Washington Coalition for Clean Air allege that health and conservational values of their members have been impaired by GSA's failure to prepare an EIS. See notes 14-16 *infra* and accompanying text. These values to members are interests germane to the objectives of both organizations. See note 4 *supra*. The declaratory and injunctive relief sought by these two organizations does not require individualized proof, and can be properly resolved in a group context.

[14] Brief for Appellants at 5.

[15] *United States v. SCRAP*, *supra* note 10, 412 U.S. at 684-690, 93 S.Ct. at 2414-2417, 37 L.Ed.2d at 268-271; *Environmental Defense Fund v. Hardin*, 138 U.S.App.D.C. 391, 394-395, 428 F.2d 1093, 1096-1097 (1970); *Coalition for Environment v. Volpe*, *supra* note 10, 504 F.2d at 167; *Alameda Conservation*

[footnote continued]

the zone of protection afforded by NEPA.[16]

Appellants have shown, moreover, that their injury

Ass'n v. California, 437 F.2d 1087, 1091 (9th Cir.), *cert. denied*, 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971); *Harlem Valley Transport. Ass'n v. Stafford*, 360 F.Supp. 1057, 1064 (S.D.N.Y. 1973), *aff'd*, 500 F.2d 328 (2d Cir. 1974). Even though pollution allegedly caused by the challenged conduct may affect all people in the surrounding area, a small group of those affected by the pollution can still attack that conduct in court. *United States v. SCRAP*, *supra* note 10, 412 U.S. at 686-688, 93 S.Ct. at 2415, 37 L.Ed.2d at 269-270; *Sierra Club v. Morton (Mineral King)*, *supra* note 10, 405 U.S. at 734, 92 S.Ct. at 1366, 31 L.Ed.2d at 643. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, *supra* note 11. As the Supreme Court has stated:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Sierra Club v. Morton (Mineral King), *supra* note 10, 405 U.S. at 734, 92 S.Ct. at 1366, 31 L.Ed.2d at 643.

[16] *United States v. SCRAP*, *supra* note 10, 412 U.S. at 687 n.13, 93 S.Ct. at 2415 n.13, 37 L.Ed.2d at 269 n.13; *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977); *Cady v. Morton*, 527 F.2d 786, 791-792 (9th Cir. 1975); *Harlem Valley Transport. Ass'n v. Stafford*, *supra* note 15, 360 F.Supp. at 1064; *James River v. Richmond Metropolitan Auth.*, 359 F.Supp. 611, 625 (E.D.Va.), *aff'd*, 481 F.2d 1280 (4th Cir. 1973); *Save the Courthouse Comm. v. Lynn*, 408 F.Supp. 1323, 1332-1333 (S.D.N.Y. 1975). The appellants' interest in a healthful and aesthetic environment is recognized in NEPA's congressional declaration of national environmental policy. NEPA states that

> it is the continuing responsibility of the Federal Government to use all practicable means, . . . [to] assure for all Americans safe, healthful, productive, and aesthetically, and culturally pleasing surroundings [and] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences . . . .

42 U.S.C. § 4331(b)(2), (3) (1976).

can be traced to GSA's failure to prepare an EIS.[17] Their complaint avers that had GSA done so, it would have had to assess the adverse environmental effects of leasing the Great Plaza area under an arrangement offering parking spaces to federal employees for fees less than commercial rates.[18] In its EIS, GSA would also have had to consider alternatives to the leasing agreement,[19] such as charging permit holders a commercial rate for parking, offering subsidies to those who use mass transit, or restricting the area to non-parking uses.[20] Such an approach, according to appellants' complaint, would have ensured that the use of the Great Plaza does not contribute unnecessarily to noise and air pollution in the surrounding area. These allegations are sufficient to confer standing upon appellants to challenge GSA's omission of an EIS.

To litigate their remaining claim, it was incumbent upon appellants to show that they have been "adversely affected" by GSA's alleged violations of the Public Buildings Amendments of 1972. While appellants have urged that their health and conservational values are similarly diminished by GSA's failure to exact commercial parking rates from federal employees,[21] it seems clear that these asserted losses fall well outside the zone safeguarded by the Amendments.[22] The purpose of the

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[17] See note 11 *supra*.

[18] NEPA requires that an EIS detail the environmental impact of the proposed action, and any adverse environmental effects that cannot be avoided should the proposal be implemented. 42 U.S.C. § 4332(2)(C)(i) (1976). See note 2 *supra*.

[19] An EIS must also analyze alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii) (1976). See note 2 *supra*.

[20] Brief for Appellants at 3-4.

[21] See notes 2-4 and accompanying text *supra*.

[22] A party will be denied standing if his alleged injury is to an interest that is not arguably within the zone of interests protected

[footnote continued]

Amendments is to provide the Government with an economical and efficient system for the procurement, utilization and disposal of property.[23] Health and conservational concerns, which indubitably underlie NEPA, are not among those that Congress arguably sought to accommodate by enactment of the Public Buildings Amendments of 1972. We hold that appellants do not have standing to challenge the asserted infringement of the Amendments.[24]

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by the statute in question, even though injury in fact has been sufficiently established. *Tax Analysts & Advocates v. Blumenthal*, 184 U.S.App.D.C. 238, 566 F.2d 130 (1977); *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 691-692 (2d Cir.), *cert. denied*, 404 U.S. 1004, 92 S.Ct. 559, 30 L.Ed.2d 557 (1971); *Sissons v. Office of Selective Serv.*, 454 F.2d 279 (9th Cir. 1972); *Window Sys., Inc. v. Manchester Memorial Hosp.*, 424 F.Supp. 331, 338 (D.Conn.1976). But see *Ballerina Pen Co. v. Kunzig*, 140 U.S.App.D.C. 98, 101, 433 F.2d 1204, 1207 (1970), *cert. denied sub nom. National Indus. for the Blind v. Ballerina Pen Co.*, 401 U.S. 950, 91 S.Ct. 1186, 28 L.Ed.2d 234 (1971); *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859 (1970).

[23]While no general statement of policy was adopted with the 1972 Amendments, a general statement of legislative purpose can be found in the statute amended, the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§471 *et seq.* (1976). See note 3 *supra*. Examination of a general statement of congressional policy to delineate the zone of interests preserved by the statute is appropriate where the general provision and the particular provision allegedly violated share an "identity of purpose." *Tax Analysts & Advocates v. Blumenthal, supra* note 22, 184 U.S.App.D.C. at 249, 566 F.2d at 141; *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 149 U.S.App.D.C. 159, 164-165, 459 F.2d 1183, 1188-1189 (1972). Clearly, these two provisions share an identity of purpose since the Federal Property and Administrative Services Act of 1949, like its subsequent amendments, was not intended to achieve a wide variety of economic and social goals, but simply to accomplish an efficient allocation of government space. See note 3 *supra*.

[24]Alternatively, we conclude taht this challenge fails also on the merits. See Part IV *infra*.

II.

THE DISTRICT COURT'S PROCEDURES

Appellants charge the District Court with procedural error, stating that it did not treat GSA's motion to dismiss as a motion for summary judgment. They argue that whenever a federal trial court considers matters outside the pleaings in ruling on a motion to dismiss, the motion must be treated as one for summary judgment.[25] Appellants also point to GSA's failure to file its motion to dismiss at least ten days prior to what it says was a hearing thereon.[26]

We have no quarrel with appellants' view of adjective law. But, contrary to appellants' position,[27] the session held by the District Court was devoted to appellants' motion for a preliminary injunction and the merits of

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[25]Appellants rely primarily on Fed.R.Civ.P. 12(b), which states:

> If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[26]Had GSA's motion been for summary judgment, as appellants argue, it would have called into play Fed.R.Civ.P. 56(c), providing that it be served at least ten days before the date of the hearing. Appellants also note that the District Court's Rule 1-9(d) specifies that a party opposing a motion shall have ten days from the date of service to file a statement in opposition to the motion. Since the hearing before the court concerned *appellants'* motions for injunctive relief and not *GSA's* motion to dismiss, we find that appellants were not prejudiced when GSA filed its motion only six days prior to the hearing. See also note 28 *infra*.

[27]Appellants incorrectly argue, Brief for Appellants at 10, that the District Court's hearing concerned GSA's motion to dismiss.

its case for a permanent injunction,[28] matters previously consolidated for hearing.[29] The court thus did not deal with GSA's motion to dismiss, but rather examined the relief appellants sought, denied their request, and finding none other appropriate to grant, properly dismissed the complaint.[30]

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[28]The District Court, in its preparatory remarks, clearly informed both parties of the hearing's purpose, Transcript (Tr.) 2, App. 5, and throughout the hearing counsel for both parties focused their arguments on appellants' applications for preliminary and permanent injunctive relief. As counsel for GSA noted during the hearing:

> Plaintiffs ask for an injunction against the assignment and the effectiveness of the assignment of the parking places of the Great Plaza lot. Those issues are moot since both the assignment and the effectiveness of the assignment have been accomplished.
>
> They also ask that all parking in the lot be enjoined. As our papers point out, there is no legal basis for doing so.

Tr. at 10, App. for Appellants at 13.

Appellants' reliance on Fed.R.Civ.P. 12(b), therefore, is misplaced since the applicability of the rule is triggered only when a court considers a party's motion to dismiss and reaches a decision thereon. See *Carter v. Stanton*, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972), cited by appellants, where the Court remanded the case because the trial court, *at a preliminary hearing on a motion to dismiss*, received matters outside of the pleadings.

[29]Fed.R.Civ.P. 65(a)(2) states:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

[30]At the conclusion of the hearing on the merits, the District Court informed the parties of its findings. The court found that

> PMI is an indispensable party to this action; and not having been made so, it justifies dismissal.
>
> In addition to that, the Court holds that the reassignment of these parking spaces is not a major federal action which requires an environmental impact statement.

[footnote continued]

Moreover, appellants have not alleged any prejudice resulting from the course taken by the District Court. All parties were given three weeks' notice of the consolidation,[31] and must have understood that the hearing on the preliminary and permanent injunctive relief was meant to be their final day in court.[32] Appellants' argument of reversible procedural error must be rejected.

III.

THE LEASE AND MAJOR FEDERAL ACTION

The central issue on appeal is whether GSA's decision to lease the Great Plaza area to a parking management firm was a major federal action significantly affecting the environment.[33] GSA, in an "environmental analysis"[34]

> The Court further is of the view, particularly after studying the legislative history of 4490 [40 U.S.C. § 490] that the action in this case of the government complies with the sections of 4490(j) and (k) [40 U.S.C. §§ 490(j) and (k)], when read together . . .
>
> The Court will, therefore, deny the motion for preliminary and permanent injunction, and will dismiss the complaint.

Hearing Transcript (Tr.) at 11-12, App. 14-15. In view of our resolution of other issues, we find it unnecessary to review the court's decision to dismiss the action for failure to join an indispensable party.

[31]Brief for Appellees at 16-17.

[32]*Crumble v. Blumenthal*, 549 F.2d 462, 466 (7th Cir. 1977). See also *Singleton v. Anson County Bd. of Educ.*, 387 F.2d 349 (4th Cir. 1967); *Puerto Rican Farm Workers v. Eatman*, 427 F.2d 210 (5th Cir. 1970); 7 Moore's Fed. Practice ¶ 65.04[4] (2d ed. 1978).

[33]NEPA is activated only by actions of that nature. See note 2 *supra*.

[34]"Environmental Analysis-Outlease of Great Plaza Parking Lot, Washington, D.C.," reprinted in App. 19-28, [hereinafter cited as "Environmental Analysis"].

prepared before it entered into the 1976 lease, found that "[t]he continued use of the Great Plaza Parking Lot will not degrade air quality from the present level, since the pollutants generated by the cars using the parking lot are already included in the present level."[35] GSA concluded that "[t]he leasing of the Great Plaza Parking Lot to a parking management firm for a period of four years, is not considered to be a major Federal action which would significantly affect the quality of the human environment."[36] Appellants respond by contending that the approximately 1,800 vehicles utilizing the lot daily contribute pollutants that significantly degrade local air quality.[37] Since "GSA's [parking] program

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[35] Environmental Analysis, App. 23. This report also noted that the level of pollutants may have declined in recent years because of the institution of a carpool-priority system which has increased the average occupancy per vehicle:

> The continued use of the Great Plaza Parking Lot will not degrade air quality from the present level, since the pollutants generated by the cars using the parking lot are already included in the present level.
>
> Furthermore, GSA's mandatory carpool requirements are increasing the average vehicle occupancy of the cars using the lot. For example, the average occupancy per vehicle has increased from 4.27 in the initial assignment effort in 1974 to 4.6 in the most recent reissuance of permits.
>
> This increase in vehicle occupancy means people who were using alternative modes of transportation, either mass transit or automobile, are now carpooling. Consequently, the overall vehicle miles traveled has been reduced by the amount of mileage traveled by those who gave up driving alone and joined carpools. However, the amount of this reduction has not been calculated.

Id. (footnote omitted).

[36] Environmental Analysis, App. 26.

[37] In support of their argument, appellants cite GSA's Environmental Analysis, which states:

> There will be a continuation of the temporary adverse impacts relative to the operation of the Parking Lot. These

[footnote continued]

continues to harm the environment," appellants maintain, an EIS must be prepared even though the leasing arrangement is a continuing project.[38]

An agency commencing federal action has the initial and primary responsibility for ascertaining whether an EIS is required.[39] An initial agency determination on

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> impacts will last as long as the site is used as a parking lot; and are primarily a continuation of pollutants contributed to air quality by the vehicles using the parking lot and a continuation of the congestion on surrounding streets contributed to the vehicles using tne parking lot.

Environmental Analysis, App. 24.

Appellants urge, in the alternative, that even if operation of the Great Plaza parking lot is not major federal action, then the "federal parking program as a whole" must be action of that character, since the cumulative effect of all federal parking lots will have a significant impact on the environment. Brief for Appellants at 17. The record, however, does not support appellants' claim that GSA has a national or areawide parking plan, and that is a matter beyond the range of judicial notice. Such a plan would be a necessary predicate for NEPA's requirement of an EIS. See *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), where the Court held that a regional EIS on coal-related operations is not required if a regional plan or program does not exist. The Court stated that

> respondents' desire for a regional environmental impact statement cannot be met for practical reasons. In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for an impact statement.

Id. at 401, 96 S.Ct. at 2726, 49 L.Ed.2d at 585. Moreover, even if a national or areawide parking program did exist, appellants have failed to show federal "action" taken with respect to that program. See note 2 *supra*.

[38] Brief for Appellants at 14.

[39] *Kleppe v. Sierra Club, supra* note 37, 427 U.S. at 412–414, 96 S.Ct. at 2731–2732, 49 L.Ed.2d at 591–593 (1976); *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, 156 U.S.App.D.C. 395, 410, 481 F.2d 1079, 1094 (1973); *Morningside Renewal Council v. Atomic Energy Comm'n*, 482 F.2d 234,

[footnote continued]

this matter is judicially vulnerable only when the agency has abused its discretion or has acted arbitrarily.[40] This standard of review notwithstanding, a court is obligated to make sure that the agency took a "hard look" at the environmental consequences of its decision.[41]

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238 (2d Cir. 1973); *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978); *First Nat'l Bank of Chicago v. Richardson*, 484 F.2d 1369, 1380-1381 (7th Cir. 1973).

[40] As the Supreme Court has recently noted:

> The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. . . . Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.

Kleppe v. Sierra Club, *supra* note 37, 427 U.S. at 412, 96 S.Ct. at 2731, 49 L.Ed.2d at 591 (citation omitted). See also *Vermont-Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 554-555, 98 S.Ct. 1197, 1217, 55 L.Ed.2d 460, 486 (1978); *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 146 U.S.App.D.C. 33, 39, 449 F.2d 1109, 1115 (1971); *Hanly v. Kleindienst*, 471 F.2d 823, 828-829 (2d Cir. 1972), *cert. denied*, 412 U.S. 980, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973); *Nucleus of Chicago Home Owners Ass'n v. Lynn*, 524 F.2d 225, 229-230 (7th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976); *Robinson v. Kneble*, *supra* note 16, 550 F.2d at 427.

[41] *Kleppe v. Sierra Club*, *supra* note 37, 427 U.S. at 410 n. 21, 96 S.Ct. at 2730 n. 21, 49 L.Ed.2d at 590 n. 21; *Maryland-Nat'l Capitol Park & Planning Comm'n v. United States Postal Serv.*, 159 U.S.App.D.C. 158, 169, 487 F.2d 1029, 1040 (1973); *Fund for Animals v. Frizzell*, 402 F.Supp. 35, 37 (D.D.C. 1975), *aff'd*, 174 U.S.App.D.C. 130, 530 F.2d 982 (1976). *Cf. Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 393, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29

[footnote continued]

In the instant case, we cannot say that GSA acted unreasonably in concluding that its decision to lease the Great Plaza area to a parking management firm was not major federal action significantly affecting the environment. We are informed that GSA ascertains the parking needs at each federal building and project on a case-by-case basis,[42] and that if GSA determines that an EIS must be developed in any specific instance, the parking plans for that project will be considered in the EIS.[43] An agency decision to consider jointly the environmental consequences of a federal project and its adjacent parking facility is not an unreasonable interpretation of the NEPA mandate.[44]

The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo.[45] GSA

L.Ed.2d 701 (1971); *Wait Radio v. FCC*, 135 U.S.App.D.C. 317, 321, 418 F.2d 1153, 1157 (1969), *later appeal*, 148 U.S.App.D.C. 179, 180, 459 F.2d 1203, 1204, *cert. denied*, 409 U.S. 1027, 93 S.Ct. 461, 34 L.Ed.2d 321 (1972).

[42] Brief for Appellees at 23.

[43] *Id.* The record does not disclose whether an EIS was prepared on the environmental impact of the Federal Triangle facilities. It is unlikely, however, that it was since that project was completed long before NEPA became effective.

[44] Since a federal building or project usually generates a need for automobile parking, it is reasonable to assess parking and related problems—such as congestion and noise and air pollution—when the project itself is subject to an EIS. That approach strikes us as a suitable means of meeting the Council of Environmental Quality's regulations, which state:

> The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated.

40 C.F.R. § 1500.6(a) (1977).

[45] In *Andrus v. Sierra Club*, ___ U.S. ___, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979), the Supreme Court ruled that NEPA does

[footnote continued]

has clearly shown in the information provided in its environmental analysis[46] that current leasing of the Great Plaza area to a parking management firm does not alter the status quo ante.[47] Without a change in parking policy concerning the Great Plaza area there is no proposal for major federal action significantly affecting the environment.[48]

To compel GSA to formulate an EIS under these circumstances would trivialize NEPA's EIS requirement

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not require federal agencies to prepare EIS's accompanying appropriation requests, since such requests are neither "proposals for legislation" nor "proposals for . . . major federal action" for purposes of § 102(2)(C). 42 U.S.C. § 4332(2)(C) (1976), quoted in note 2 *supra*.

[46]To ensure the agency's understanding of the statutory standards and its adequate consideration of the problem, we deem it important that the agency state its reasons for not preparing an EIS. *Asphalt Roofing Ass'n v. ICC*, 186 U.S.App.D.C. 1, 12, 567 F.2d 994, 1005 (1977); *Maryland-Nat'l Capitol Park & Planning Comm'n v. United States Postal Serv.*, *supra* note 41, 159 U.S. App.D.C. at 168–169, 487 F.2d at 1039–1040; *Arizona Pub. Serv. Co. v. FPC*, 157 U.S.App.D.C. 272, 279, 483 F.2d 1275, 1282 (1973); *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, *supra* note 39, 156 U.S.App.D.C. at 410–411, 481 F.2d at 1094–1095; *Hanly v. Kleindienst*, *supra* note 40, 471 F.2d at 835–836. Here we find the information provided by GSA in its Environmental Analysis sufficient to meet this demand.

[47]A revision or expansion of an agency program in a manner constituting major action significantly affecting the quality of human environment must be accompanied by an EIS. *Andrus v. Sierra Club*, *supra* note 45, ___ U.S. at ___, 99 S.Ct. at 2343–2344, 60 L.Ed.2d at 955; S.Rep.No.296, 91st Cong., 1st Sess. 20 (1969).

[48]See note 45 *supra*. The President has recently taken steps to eliminate free or subsidized parking for federal employees. See 15 Weekly Compilation of Presidential Documents 613 (Apr. 5, 1979). These actions are not yet effective, and even if they were, would not moot appellants' claim that an EIS should be prepared whenever space in federal parking facilities is leased to federal employees.

and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment. NEPA's call for an EIS is governed by the rule of reason,[49] and that rule was not transgressed by GSA's failure to prepare an EIS prior to leasing the Great Plaza area to a parking management firm in 1976.

IV.

THE PUBLIC BUILDINGS AMENDMENT OF 1972

As we have stated, appellants also charge that the GSA parking program at Great Plaza violates Section 490(j) of the Public Buildings Amendments of 1972[50] by allocating parking fees between federal employees and their respective agencies.[51] Appellants argue that the full fee should be paid by employees because, they say, as "users" of the parking spaces they must pay appropriate commercial charges to comply with Section 490(j).[52] We have held that appellants lack standing

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[49]*Vermont-Yankee Nuclear Power Corp. v. National Resources Defense Council*, *supra* note 40, 435 U.S. at 551, 98 S.Ct. at 1215–1216, 55 L.Ed.2d at 484; *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, *supra* note 39, 156 U.S.App.D.C. at 407–408, 481 F.2d at 1091–1093; *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1131 (5th Cir. 1974); *Iowa Citizens for Environmental Quality v. Volpe*, 487 F.2d 849, 852 (8th Cir. 1973); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283, 1286 (9th Cir. 1974).

[50]See text *supra* at notes 3–4.

[51]The employees pay the parking management firm $11.25 per month for each parking space. GSA charges the agencies an additional $28.50 per month for each space used by their respective employees. Brief for Appellees at 25–26. Appellants do not contend that the $39.75 monthly total per space was less than the prevailing commercial rate. Brief for Appellants at 27.

[52]Reply Brief for Appellants at 2.

to challenge violations of this legislation.[53] We now add, alternatively, that there is no merit in their contentions.

GSA disagrees with appellants' reading of Section 490(j), and its interpretation is entitled to great weight in a reviewing court.[54] The deference owed an agency's construction of a statute it administers is heightened when, as in this case, the agency was actively involved in the drafting and adoption of the statutory language.[55]

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[53] See notes 21-24 and accompanying text *supra*.

[54] Interpretation of a statute by the agency charged with its execution should be given great deference by the courts. *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55, 97 S.Ct. 2229, 2234, 53 L.Ed.2d 100, 108 (1977); *Lewis v. Martin*, 397 U.S. 552, 559, 90 S.Ct. 1282, 1286, 25 L.Ed.2d 561, 567 (1970); *Zemel v. Rusk*, 381 U.S. 1, 11, 85 S.Ct. 1271, 1278, 14 L.Ed.2d 179, 187 (1965); *Forester v. Consumer Prod. Safety Comm'n*, 182 U.S.App.D.C. 153, 162, 559 F.2d 744, 783 (1977); *Haviland v. Butz*, 177 U.S.App.D.C. 22, 27, 543 F.2d 169, 174 (1976); *Lenkin v. District of Columbia*, 149 U.S.App.D.C. 129, 141, 461 F.2d 1215, 1227 (1972) and cases cited in notes 81-82 therein.

The Administrator of General Services has congressional authorization to maintain and operate governmental buildings, and to exact payment for the utilization of services and space by other federal agencies:

> Whenever and to the extent that the Administrator has been or hereafter may be authorized by any provision of law other than this subsection to maintain, operate, and protect any building, property, or grounds situated in or outside the District of Columbia, including the construction, repair, preservation, demolition, furnishing, and equipment thereof, he is authorized in the discharge of the duties so conferred upon him . . .
>
> to obtain payments, through advances or otherwise, for services, space, quarters, maintenance, repair, or other facilities furnished, on a reimbursable basis, to any other Federal agency . . . and to credit such payments to the applicable appropriation of the General Services Administration.

40 U.S.C. § 490(a) (1976).

[55] *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327-328, 24 L.Ed.2d 345, 360 (1969); *United States v. American Trucking*

[footnote continued]

GSA's implementation of Section 490(j) means that each agency is required to pay GSA the prevailing commercial rate for space utilized by that agency's employees, and each employee is obligated to pay the parking management firm a fee which reflects the cost of management and operation of his space.[56] Such an approach is a reasonable interpretation of Section 490(j),

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Ass'ns, 310 U.S. 534, 547-549, 60 S.Ct. 1059, 1066-1067, 84 L.Ed. 1345, 1353-1354 (1940); *Certified Color Mfg. Ass'n v. Matthews*, 177 U.S.App.D.C. 137, 147, 543 F.2d 284, 294 (1976); *Patagonia Corp. v. Board of Governors of Fed. Reserve Sys.*, 517 F.2d 803, 812 (9th Cir. 1975).

GSA was actively involved in framing language for the Public Buildings Amendments of 1972. On August 4, 1971, GSA submitted to the Speaker of the House a draft of legislation proposing amendment of two statutes—the Public Buildings Act of 1959 and the Federal Property and Administrative Services Act of 1949—to

> . . . require using agencies to budget and pay for the use of space and related services and to authorize the General Services Administration, subject to conventional Congressional and Executive controls, to finance its public buildings operations from the receipts arising therefrom.
>
> Requiring all agencies to finance the cost of the space they occupy is consistent with the performance budgeting concept under which total program costs are reflected in the cost accounts of the program agency . . .
>
> Section 4 would authorize the Administrator to establish such charges for the property management services provided other agencies. This would be accomplished by adding a new subsection (j)(1) to section 210 of the Property Act which concerns the operation of buildings and related activities.

H.R.Rep.No. 989, 92d Cong., 2d Sess. 11-13 (1972); *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 2370, 2375.

[56] See Affidavit of Jay Cohen, Transportation Specialist, General Services Administration, App. 41. The affidavit states that the $28.50 per month paid by the agency "is the Standard Level User Charge (SLUC) required by 40 U.S.C. § 490(j)." Affidavit of Jay Cohen, App. 41. We interpret this to mean that the agency pays the commercial rate for the space itself and the employee pays the additional cost of maintaining and operating the space.

particularly in light of its legislative history, which reveals that the congressional purpose pervading passage of the Public Buildings Amendments of 1972 was to make government agencies accountable for the space they utilize and to prevent agencies from demanding space is excess of their needs.[57]

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[57]The congressional purpose underlying passage of Section 490(j) of the Public Buildings Amendments of 1972 emanated from a concern that unless agencies are charged commercial rates for the space they use, their demands for space would exceed their actual needs. The House Report stated:

> H.R. 10488, as reported, would require Government departments and agencies to pay user charges for the space they occupy in GSA-operated buildings. Such user charges would be deposited into the buildings fund. . . .
>
> When the fund proposed in the bill is implemented, each agency would have to budget for its space needs, just as it now budgets for its personnel, travel, and other administrative costs. This would promote more efficient, more economical use of space by Government agencies. . . . Making agencies accountable for the space they use should result in more efficient space utilization by agencies.

H.R.Rep.No.989, 92d Cong., 2d Sess. 7-8 (1972), *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 2372-2373. Similar language was found in the Senate report:

> Last, it is apparent to the committee that, at least in part, the government's current space problem may be attributed to a misallocation of existing office space among the Federal agencies. The G.S.A. presently bears the budgetary responsibility for the cost of the office space occupied by most of the Executive branch. Since the departments and agencies themselves are not assessed in their individual budgets for the value of the space which they occupy, they have little incentive to conserve. Instead, the tendency is for agencies to request from G.S.A. more space than they legitimately need, and then to hoard it. Aside from the fact that an accurate performance budget is defeated unless agencies are held accountable for all of their costs, the diseconomies of the present arrangement are clear.

S.Rep.No.412, 92d Cong., 1st Sess. 4 (1971).

We find no merit in appellants' allegations that GSA, in leasing the Great Plaza area to a parking management firm, violated either NEPA or the Public Buildings Amendments of 1972. The judjment of the District Court is accordingly

Affirmed.

WILKEY, Circuit Judge:

I concur in the result.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1978
No. 77-1160

[Filed Aug 22 1979]

Committee for Auto Responsibility (C.A.R.) et al.,
Appellants,

v.

Jay Solomon, et al.,
Appellees.

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, Wilkey, and Wald, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants Committee for Auto Responsibility (C.A.R.), et al., having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
/s/ George A. Fisher
George A. Fisher
Clerk

Circuit Judge McGowan did not participate in the foregoing order.

APPENDIX C

UNITED STATES DISTRICT COURT
For the District of Columbia

Civil Action No. 76-2084
[Filed Dec 6 1976]

COMMITTEE FOR AUTO RESPONSIBILITY, et al.,
Plaintiffs,

v.

JACK ECKERD, GENERAL SERVICES ADMINISTRATION, et al.,
Defendants.

ORDER

Upon consideration of plaintiffs' motion for Preliminary Injunction and memorandum of points and authorities in support thereof and defendants' opposition thereto, and Defendants' motion to dismiss and memorandum of points and authorities in support thereof, it is by the Court this 6th day of December, 1976,

ORDERED that plaintiffs' motion for preliminary injunction and permanent injunction be, and the same hereby are, denied; and it is

FURTHER ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

/s/ Hart, J.
United States District Judge

APPENDIX D

38 Fed. Reg. 30629

Parking restrictions. Parking restrictions are used in the majority of plans to discourage automobile use in urban centers. Restrictions in the central business district can significantly reduce carbon monoxide levels. As a measure to discourge the commuter from using his vehicle, parking limitations can effectively reduce emissions during the rush hour and result in reduced oxidant concentrations later in the day. On-street parking regulations can also result in decreased congestion and reduced emissions due to improved traffic flow.

In most EPA proposals, all parking facilities on which the actual construction work had not begun by August 15, 1973, would have been subject to review in response to comments received, this definition has been revised to exempt such facilities if the actual construction contract has been let by that date.

However, where a developer has undertaken to build a facility, whether individually or as part of a larger structure, but the actual construction contract has not yet been signed, review will still be required. It is EPA's judgment that the project in such circumstances will still be at an early enough stage so that review to determine the possibility of decreased use of single-passenger automobiles will still be justified. However, the Administrator also recognizes that such review may be unduly burdensome in particular cases, and comment on this point is particularly invited. If the comments indicate that a less restrictive definition is justified, the promulgated regulations will be amended accordingly.

APPENDIX E

United States Government

Department of Transportation
Urban Mass Transportation Administration

Memorandum

DRAFT

DATE: 5-12-77

In reply refer to: Burbank/UPP-20

SUBJECT: Federal Subsidies of Employee Parking

FROM: Acting Administrator

TO: The Secretary

Recently, John Freeland of the Washington, D.C. Council of Governments wrote to request your views on a Federal Parking Policy drafted by COG's Transportation Planning Board. This policy, which is based on elimination of Federal employee parking subsidies, has been raised several times in the past, but to no avail. I believe I speak not only for myself but also for the personal and professional opinions of UMTA staff when I strongly urge you to consider the following in responding to COG's inquiry.

Federal workers account for about half of the roughly 140,000 commuters' cars that come every day into the central employment area—downtown Washington, Capitol HIll, the Pentagon, and nearby Arlington. About 41,000 of those cars are parking in spaces provided by Federal agencies and Congress. Three-fourths of those spaces are free. The rest cost from $5 to $20 per month, appreciably less than commercial rates which sometimes exceed $50 a month.

The decision to provide free and minimal cost parking to Federal employees is an old one and one which has been the recurring subject of local editorials, a frequent source of chagrin to those who promote the Department's TSM requirement, and also the current target of a lawsuit before the U.S. Court of Appeals here. Criticism of free and subsidized Federal parking has increased in recent years, based first on air pollution concerns and more recently on energy conservation concerns. The President's energy conservation program has added momentum to the criticism, as has the opening of D.C. METRO. As METRO adds more stations and struggles to attract auto drivers, Federal employee parking subsidies will be one of its greatest impediments.

Our efforts to encourage carpooling, vanpooling, bicycling, and walking are also undermined by parking subsidies. While many agencies, including DOT, assign parking spaces mainly to carpools, there are many excepted employees and widespread evidence of phantom carpooling; charging commercial parking rates would ensure that those who drive alone bear a more realistic cost for the energy and environmental burden they impose or would encourage drivers to round up real riders to share costs. And charging market rates would not impose great hardships on people who pool; $40 a month divided among four people would be just $10 apiece. Underscroing the need for strong carpool incentives is the evidence that, nationally, carpool programs have not been as successful as is often claimed. Preliminary results of the 1975 Journey-to-Work Survey indicate that 2/3 of all urban work trips—including transit work trips—are made by drivers who are alone in their cars.

Beyond the energy, environmental, METRO, and carpooling issues, however, is the overriding issue of

equity. We are frankly bemused by the frequent defenses of low commuter parking charges on income-distribution grounds. The most recent data on income distribution for work trips (1970 Census) show that Washington, D.C. auto drivers have a median income of $9500, second only to a median income of $9600 for New York City drivers. In sharp contrast are the median incomes of Washington public transportation commuters—$6200—and of D.C. auto passengers—$7500. Yet our Federal employee policy is to provide the following kinds of subsidies, relative to commercial rates in the area:

auto driver	$40/month
two-person carpool	$20/month/person
four-person carpool	$10/month/person
transit rider	0

We believe the Federal parking policy has a powerful effect on other employers in Washington, pressuring them to provide a similar benefit to their employees. We applaud the efforts of COG and the District in particular to reduce rush-hour auto use through various parking measures. We note in particular the fact that D.C. government converted to comercial rates for its employees in 1973, that employees must pay $57/month to park at COG, that D.C. has developed and instituted a residential parking program, and that D.C. has embarked on a major campaign to tighten and streamline enforcement of rush-hour parking violations.

The goals of the COG parking policy are too important and the relevance of parking subsidies to these goals is too substantial to again be brushed aside. We urge you to give substantive and meaningful support to COG's efforts and we offer to assist in the development of a new DOT or Federal parking policy which is consistent with national goals. At a minimum, we feel that the time

has arrived for a critical examination of Federal employee parking policies and DOT employee parking policies in particular.

Finally, I want to make it clear that I do not urge this in the interest of mass transit in particular; in fact I am skeptical of the merits of COG's proposal to earmark parking charges for METRO. Rather, my position is rooted in concern that our promotion of "balanced urban transportation" should be substantive rather than rhetorical and procedural. The Department should not shirk this opportunity to bring outdated Departmental and Federal parking policies into harmony with the new priorities of the country.

Charles F. Bingman
Acting

Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-790

In the Supreme Court of the United States

OCTOBER TERM, 1979

COMMITTEE FOR AUTO RESPONSIBILITY, ET AL.,
PETITIONERS

v.

R. G. FREEMAN III, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, AND GENERAL SERVICES ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
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In the Supreme Court of the United States

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COMMITTEE FOR AUTO RESPONSIBILITY, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 603 F. 2d 992. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1979 (Pet. App. 1a). A petition for rehearing was denied on August 22, 1979 (Pet. App. 24a). The petition for a writ of certiorari was filed on November 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent General Services Administration should have prepared an environmental impact statement in connection with its use of the Great Plaza parking lot in Washington, D.C., or in connection with an alleged national or regional parking plan for federal employees.

STATEMENT

The Great Plaza is a large, open-air parking facility located south of Pennsylvania Avenue between 13th and 14th Streets, N.W., in an area known as the Federal Triangle in downtown Washington, D.C. The Plaza is owned by the United States and managed by respondent General Services Administration. For the past 40 years, GSA or its predecessor agencies have leased the Plaza to private parking management firms for four-year terms. In May 1976, the agency leased the Great Plaza to Parking Management, Inc. (PMI) for the four years ending in May 1980 (Pet. App. 4a-5a).

Under the terms of the lease, 1,325 of the approximately 1,800 parking spaces at Great Plaza are reserved for federal employee parking during the work week (Pet. App. 5a, 14a). At the time this suit was filed, the federal employees who held parking permits paid PMI a monthly fee that covered the company's cost of operations.[1] PMI rents the remaining spaces at hourly or daily rates to the general public.

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[1]In 1976, this monthly fee was $11.25. In addition, each employing agency paid GSA $28.50 a month per space, a figure that represented the imputed value of the parking space (Pet. App. 19a n.51, 21a n.56). In August 1979, the Director of the Office of Management and Budget announced a change in the fee structure and stated that new GSA regulations would be forthcoming. OMB Circular A-118, 44 Fed. Reg. 48638 (1979). Under the new GSA parking regulations, 44 Fed. Reg. 53161 (1979), parking rates for federal employees will rise to full commercial rates over a two-year period. Preference will be given to carpools. GSA reports that parking charges to employees for spaces in the Great Plaza Lot are currently $25.00 per month. This charge will rise to a full commercial rate for each space on October 1, 1981. See 44 Fed. Reg. 53163 (1979).

Since 1972, all of the federal employee parking spaces at the Great Plaza have been allocated to carpools (Pet. App. 5a). Parking spaces are reassigned every six to nine months among employees working at buildings in the Federal Triangle area. Priority is given to those carpools with the largest number of riders.

In April 1976, GSA prepared an environmental analysis of the proposal to offer the Great Plaza for a four-year lease to a private parking management firm chosen through competitive building. The analysis concluded that the lease would not be a major federal action significantly affecting the quality of the environment and that therefore an environmental impact statement (EIS) did not have to be prepared. GSA reached this conclusion because the proposed lease would simply continue the existing use of the facility and would have no new effect on the environment. The analysis also observed that failure to continue the existing use might have an adverse effect on the environment because alternative parking facilities that might be used by displaced federal employees would not impose carpool requirements (Pet. App. 14a-15a & nn. 35, 37).

In November 1976, when federal employee parking spaces at the Great Plaza were reallocated, petitioners filed this action to enjoin GSA from assigning parking spaces, from allowing assignments of spaces to become effective, or from using the Great Plaza for parking, unless the agency first prepared an acceptable EIS. In addition, the complaint sought a declaratory judgment

that GSA should file a comprehensive EIS on parking programs for federal employees in the metropolitan Washington, D.C. area and in the nation as a whole.[2]

Petitioners moved for a preliminary injunction, and the district court consolidated the hearing on the motion with that on the merits, in accordance with Fed. R. Civ. P. 65(a)(2). Following the hearing, the district court dismissed the action (Pet. App. C). The court reasoned that PMI was an indispensable party and that petitioners' failure to join the company as a defendant justified dismissal. The court further ruled that the reassignment of federal employee parking spaces at Great Plaza was not a federal action that required preparation of an EIS (Pet. App. 12a-13a n.30).

The court of appeals affirmed (Pet. App. 1a-23). The court stated that GSA acted reasonably in determining that the Great Plaza lease was not a major federal action requiring an EIS (Pet. App. 17a). The court also approved GSA's general policy decision "to consider jointly the environmental consequences of a federal project and its adjacent parking facility" when the project itself involves a major federal action (Pet. App. 17a & n.44). Finally, the court held that, because the Great Plaza lease entailed no proposed policy change and no change in the use of the federal facility, GSA did not violate the National Environmental Policy Act by failing to prepare an EIS (Pet. App. 18a, 23a).

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[2]The complaint also alleged that GSA's method of setting parking charges violated the Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 219, 40 U.S.C. 490(j). The district court held the GSA practice complied with the statute (Pet. App. 13a n.30). The court of appeals held that petitioners had no standing to raise the issue (Pet. App. 9a-10a), but that in any event the district court's ruling was correct on the merits (Pet. App. 21a-22a). Petitioners do not seek review on this issue.

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court.

1. Petitioners first assert (Pet. 10-11) that GSA should have prepared an EIS in connection with "its nationwide parking program" and that the agency's failure to do so is contrary to this Court's decision in *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976). This argument is insubstantial, because, as the court of appeals held (Pet. App. 15a n. 37), "[t]he record * * * does not support [petitioners'] claim that GSA has a national or areawide parking plan, and that is a matter beyond the range of judicial notice. Such a plan would be a necessary predicate for NEPA's requirement of an EIS. * * * Moreover, even if a national or areawide parking program did exist, [petitioners] have failed to show federal 'action' taken with respect to that program."

Far from being inconsistent with *Sierra Club*, the court of appeals' ruling is a direct application of that decision. This Court held in *Sierra Club* that, in the absence of any proposal for a regional coal-leasing plan, the Department of the Interior was not obligated to prepare a regional EIS dealing with possible coal-leasing activities in a four-state area. Here, petitioners did not demonstrate in the district court, and they do not proffer any evidence in this Court, that GSA has a nationwide or regional parking plan or that the agency's continued use of such a plan involves any federal "action." Under these circumstances, *Sierra Club* establishes that no nationwide or regional EIS is necessary.

2. Petitioners further contend (Pet. 12-15) that, at a minimum, GSA should have prepared an EIS in connection with the 1976 lease of the Great Plaza parking lot. They suggest several reasons why this Court

should review the rejection of that argument by the courts below, but each of petitioners' asserted justifications for further review is flawed.

a. Petitioners maintain (Pet. 12-13) that there is a conflict among the circuits regarding the proper standard of judicial review to be applied to an agency determination that a particular agency action is not a major federal action significantly affecting the quality of the environment and that an EIS therefore is not necessary. Petitioners observe that, in cases decided before this Court's ruling in *Kleppe* v. *Sierra Club*, *supra*, some courts of appeals said that a "reasonableness" standard should be applied on judicial review of such determinations and others indicated that a reviewing court should ask only whether the agency's determination concerning the need for an EIS was arbitrary or an abuse of discretion. Compare, *e.g.*, *City of Davis* v. *Coleman*, 521 F. 2d 661, 673 (9th Cir. 1975); and *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 465 (5th Cir. 1973) ("reasonableness"), with *Hanly* v. *Kleindienst*, 471 F. 2d 823, 828-830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) ("arbitrary and capricious").

Whatever conflict may have existed before *Sierra Club* was resolved by this Court in that case. The Court held that the "arbitrary, capricious, or abuse of discretion" test should govern. In the Court's words (427 U.S. at 412) (citations omitted):

> Respondents conceded at oral argument that to prevail they must show that petitioners have acted arbitrarily in refusing to prepare one comprehensive statement on this entire region, and we agree. The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant

> factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.

Moreover, it is not at all certain that any practical significance ever attached to the different verbal formulas applied by the courts of appeals. See *Peshlakai* v. *Duncan*, 476 F. Supp. 1247, 1252 & n.12 (D.D.C. 1979). Indeed, in *Maryland-National Capital Park and Planning Commission* v. *U.S. Postal Service*, 487 F. 2d 1029 (D.C. Cir. 1973), the court of appeals apparently applied both tests without identifying any clear practical distinction between them. Here, too, although the court of appeals stated that the correct standard of review was whether "the agency has abused its discretion or has acted arbitrarily" (Pet. App. 16a), the court actually held that GSA did not act "unreasonably" in determining that the Great Plaza lease was not a major federal action significantly affecting the environment (Pet. App. 17a). Accordingly, the existence of a real conflict, even before *Sierra Club*, is not clear, and in any event the court of appeals' opinion in the present case establishes that petitioners are not entitled to relief even under the "reasonableness" standard they advocate.

b. Petitioners also argue (Pet. 13-15) that the present case creates a conflict among the circuits with respect to the need for an EIS in connection with programs initiated before NEPA's enactment. In support of this contention, petitioners cite two cases, both of which involved construction projects that were partially

completed when NEPA became law. *Jones* v. *Lynn*, 477 F. 2d 885 (1st Cir. 1973); *Environmental Defense Fund* v. *TVA*, 468 F. 2d 1164 (6th Cir. 1972). The present case, by contrast, concerns the continuing operation of a federal facility, not the completion of a partially finished construction or development project. Federal agencies have enjoyed considerable discretion in applying NEPA in the context of continuing operation and maintenance programs. See, *e.g.*, *Grand Canyon Dorries, Inc.* v. *Walker*, 500 F. 2d 588, 589 (10th Cir. 1974). This discretion is reflected in the Council on Environmental Quality's recent regulations governing the implementation of NEPA (see 40 C.F.R. 1501.4(a), 1507.3, 1508.4, 1508.18) and was properly exercised in connection with the Great Plaza lease challenged by petitioners. Unlike the completion of the projects involved in *Jones* and *EDF*, the continuation of federal employee parking in the Great Plaza lot entailed no new environmental effects and therefore did not require the filing of an EIS. As the court of appeals declared (Pet. App. 17a-18a), "[t]he duty to prepare an EIS normally is triggered when there is a proposal to change the status quo. GSA has clearly shown * * * that current leasing of the Great Plaza area to a parking management firm does not alter the status quo ante."

c. Finally, petitioners contend (Pet. 11-12) that GSA's decision not to prepare an EIS in connection with the Great Plaza lease was defective because GSA reached the decision without consulting the Department of Transportation and the Environmental Protection Agency. Petitioners insist that this failure to consult violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), as construed in *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406 n.15. Petitioners have misread both the statute and the relevant footnote in this Court's *Sierra Club* opinion.

Like the EIS requirement itself, the statutory requirement of consultation with other federal agencies before the preparation of an EIS is triggered by a proposal for a major federal action that will significantly affect the quality of the human environment.[3] Neither the statutory language nor the decision in *Sierra Club* suggests that each federal agency invariably must consult with other federal departments and agencies in determining whether a particular action requires an EIS. Even if such consultation might be salutary in some cases, GSA did not err here in deciding on its own that the parking lease was not a major federal action within the meaning of NEPA. The agency action involved no new environmental effects, and that fact was readily ascertainable without consulation with other governmental bodies.

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[3]Under the CEQ guidelines in effect at the time of the lease and the filing of the complaint in the present case, consultation with other agencies was not required as part of the process of identifying major federal actions. See 40 C.F.R. 1500.6 (1978). Under the recently promulgated CEQ regulations, which replaced the former guidelines, agencies are required to "involve environmental agencies" in such determinations only "to the extent practicable." 40 C.F.R. 1501.4(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1980

DOJ-1980-02